TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 569.

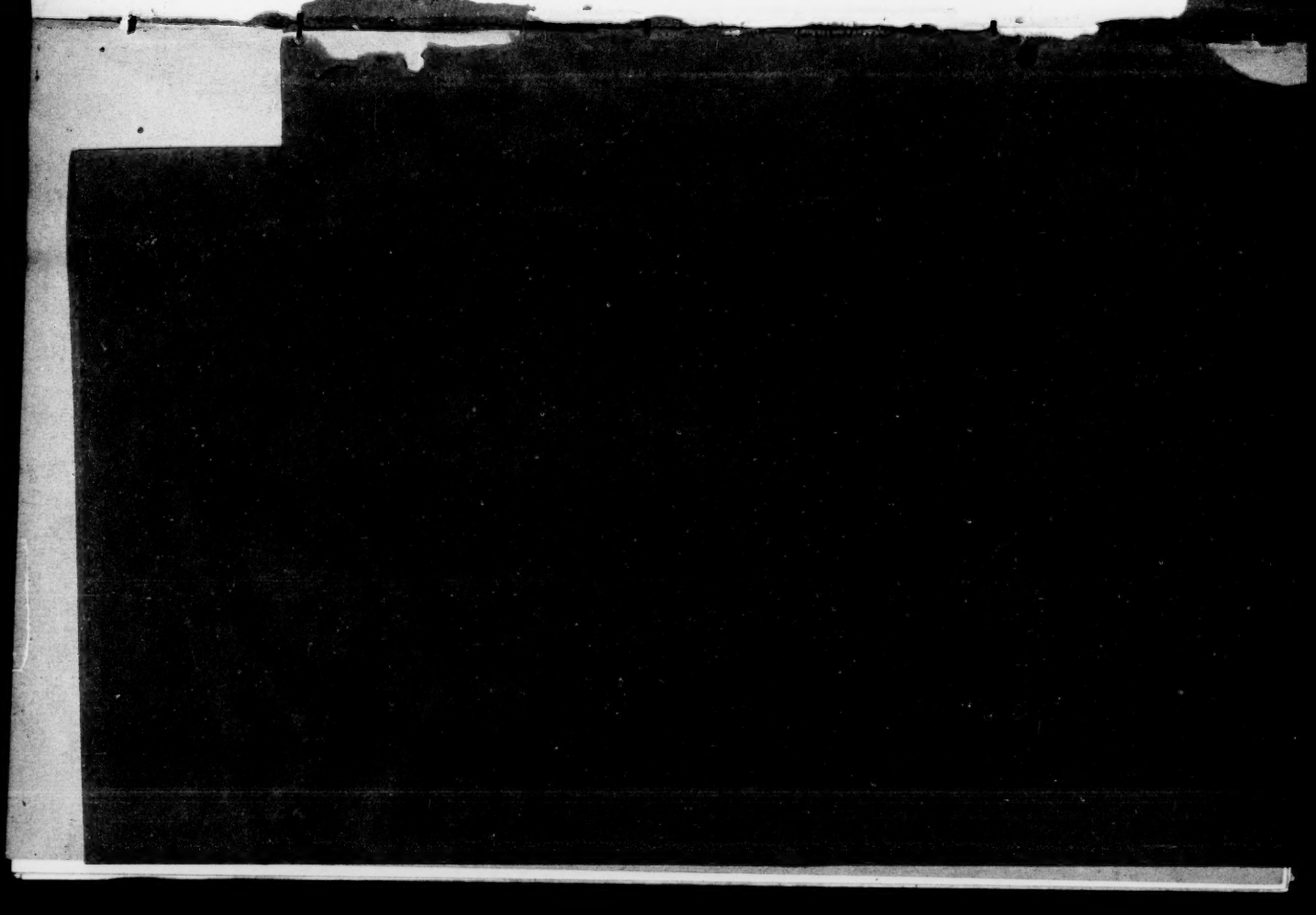
WILLIAM MASON, APPELLANT,

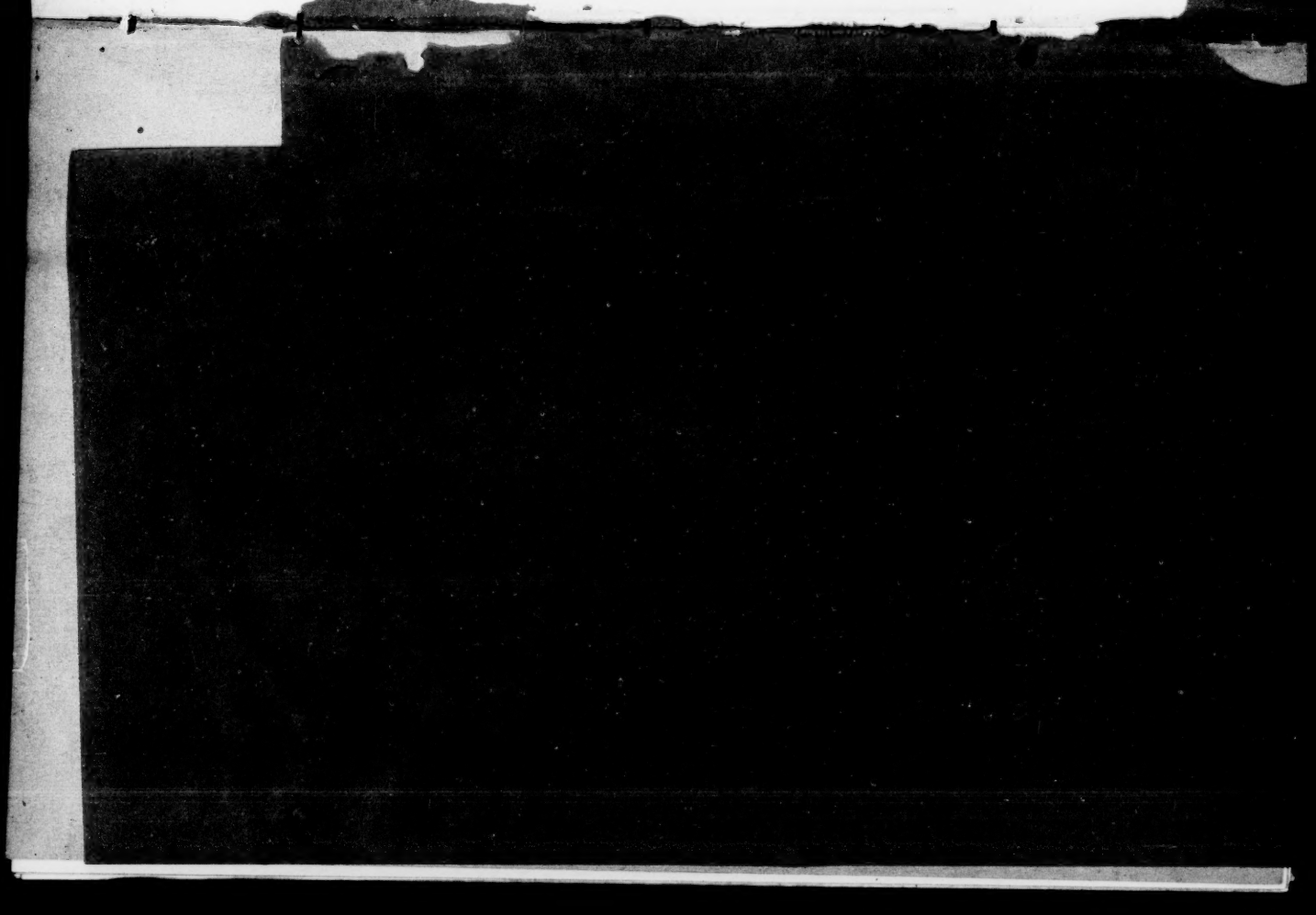
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 5, 1871.





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1 In the United States Court of Claims. December term, A. D., 1867.

WILLIAM MASON, OF TAUNTON, MASS., *vs.* THE UNITED STATES. } Filed Nov. 6, 1867.

To the honorable the justices of the Court of Claims:

Your petitioner, a citizen of the United States, residing in Taunton, in the county of Bristol and State of Massachusetts, respectfully represents to your honors:

That, on the 7th day of January, 1862, he received an order for the manufacture and delivery of fifty thousand (50,000) muskets, Springfield pattern, to the United States, which said order was from Brig. Gen. J. W. Ripley, the Chief of Ordnance, U. S. A., and in the letters and figures following, viz:

"ORDNANCE OFFICE,
"*Washington, January 7th*, 1862.

"SIR: By direction of the Secretary of War, I offer you an order for fifty thousand (50,000) muskets, with appendages, of the Springfield pattern, on the following terms and conditions, viz: These arms are to be furnished with the regular appendages, and are to be in all respects identical with the standard rifle musket made at the United States Armory at Springfield, Massachusetts, and are to interchange
2 with it and with each other in all their parts; they are to be subject to inspection by the United States inspectors in the same manner that the Springfield arms are inspected, and none are to be received or paid for but such as pass inspection, and are approved by the United States inspectors. These fifty thousand (50,000) arms and appendages are to be delivered at your armory as follows, viz: Not less than one thousand (1,000) in each of the months of July, August, and September, 1862; not less than two thousand (2,000) in each of the months of October and November, 1862; not less than three thousand (3,000) in December, 1862; and not less than four thousand per month thereafter, until the entire fifty thousand (50,000) shall have been delivered; and you are to have the right to deliver more rapidly than according to the number of arms before specified, if you can do so.

"In case of any failure to make deliveries to the extent and within the times before specified, you are to forfeit the right to deliver whatever number may be deficient in the specified number for the month in which the failure occurs.

"All these arms and appendages are to be delivered by you; and this order, if transferred to another party, is to be thereby forfeited.

"Payments are to be made, in such funds as the Treasury Department may provide, for each delivery, on certificates of inspection and receipt by the United States inspectors, at the rate of twenty dollars ($20) for each arm, including appendages. All these arms and appendages are to be packed by you in boxes of the regular pattern, with twenty (20) muskets and appendages in each box, for which a fair price, to be determined by the United States inspector, will be allowed.

"Please signify, in writing, your acceptance or non-acceptance of this order on the terms and conditions before stated herein.

"Respectfully, your obedient servant,

"JAMES W. RIPLEY,
"*Brigadier General.*

"P. S.—It is further directed by the War Department that double the number of arms and appendages, viz, one hundred thousand, will be received, if manufactured at your own establishment, in Taunton, Massachusetts, and delivered within the time before specified for the delivery of the fifty thousand arms and appendages. All the other terms and conditions of this order remaining unchanged for the additional fifty thousand.

"JAMES W. RIPLEY,
"*Brigadier General.*

"WILLIAM MASON, Esq.,
"*Taunton Massachusetts.*"

That your petitioner accepted the same, on or about the 20th day of January, 1862, and sent to Brigadier General James W. Ripley notice of his acceptance, which letter of acceptance was in the words and figures following, viz:

3 "TAUNTON, *January* 20, 1862.

"SIR: I have the honor to acknowledge the receipt of your order for muskets, dated Jan. 7th, 1862. In reply, I accept the order, and hope to be able to execute it so much to your satisfaction as to merit a more extensive contract.

"I am, sir, respectfully, your obedient servant.

"WILLIAM MASON.

"General JAMES W. RIPLEY,
"*Ordnance Office, Washington, D. C.*"

That your petitioner proceeded to fill the order so received and accepted, making changes of machinery, contracting for machinery, material, labor, and whatever was necessary to insure the full and complete performance, in good faith, of the terms of said order on his part, all of which involved a heavy outlay of money on the part of your petitioner, viz, the sum of six hundred thousand dollars.

That, on the 15th day of May, 1862, a "Commission on ordnance and ordnance stores," appointed by order of the Secretary of War, March 13th, 1862, and consisting of the Hons. Joseph Holt and Robert Dale Owen, directed Brigadier General J. W. Ripley, U. S. A., then Chief of Ordnance, to confirm the above-cited order "to the extent of thirty thousand muskets, upon condition that he" (your petitioner) "shall, within fifteen days after notice of this decision, execute bond, with good and sufficient sureties, in the form and with the stipulations prescribed by law and the regulations, for the performance of the contract, as thus modified, resulting from said order and acceptance, and upon his failure or refusal to execute such bond, then the said order shall be declared annulled and of no effect." (See Sen. Ex. Doc, 72, 2d sess., 37th Cong., pp. 311, 312, 313, 314, 315, 316, 317, and 318.) And that, although your petitioner was ready and willing to comply with the terms of said original order and acceptance, and offered and pleaded permission so to do, your petitioner was not allowed to execute said original order, but was only permitted to furnish the thirty thousand muskets named in the contract, made pursuant to the decision of the ordnance commission above cited.

And your petitioner further represents unto your honors that he was greatly hindered and delayed in the execution of his contract, by said order of the War Department and the proceedings of said commission under the same, and that, by reason of such hindrance and delay, together with the refusal of the United States to allow your petitioner to

execute the order of January 8th, 1862, above cited, your petitioner has sustained damage to the amount of five hundred thousand dollars.

And your petitioner further represents unto your honors, that he is a citizen of the United States, and has at all times borne true al-
4 legiance to the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the United States.

And your petitioner further shows that he is now and always has been the sole owner of this claim. Wherefore, your petitioner prays that your honors will enter judgment in his, your petitioner's behalf, for the sum of five hundred thousand dollars.

Dated at Taunton, Massachusetts, this 1st day of October, A. D., 1867.

(Sig.) W'M MASON.

STATE OF MASSACHUSETTS,
County of Bristol, ss :

TAUNTON, *October* 21*st*, A. D. 1867.

Before me, A. E. Swasey, a justice of the peace within and for the county of Bristol, in the State of Massachusetts, personally appeared the within-named William Mason, whose name is hereunto subscribed, and who being duly sworn, doth depose and say that no assignment or transfer of the above claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits, and offsets; and that he believes the facts as stated in said petition are true.

(Sig.) W'M MASON.

Subscribed and sworn to, this 21st day of October, A. D. 1867, before me,

(Sig.) A. E. SWASEY,
Justice of the Peace.

5 United States Court of Claims. December term, A. D., 1867.

WILLIAM MASON
vs.
THE UNITED STATES. } No. 2947. Filed May 21, 1868.

Motion to dismiss petition.

The defendant moves to dismiss the petition in the above-entitled cause, for the reason following:

Because said petition is not sworn to before any person authorized by the laws of the United States to administer oaths in judicial proceedings in the courts of the United States, as required by the rules of practice of the Court of Claims.

JOHN J. WEED,
Assistant Solicitor for the United States.

6 In the Court of Claims.

WILLIAM MASON
vs.
THE UNITED STATES. } No. 2947.

The counsel for plaintiffs moves the court for permission to amend

the verification of the petition in these cases by having the same made before a notary public or U. S. comm'r.

R. D. MUSSEY,
Of Counsel.

Filed & allowed June 1, 1868.

7 *Amended verification of petition.—Filed Oct.* 9, 1869.

STATE OF MASSACHUSETTS,
County of Bristol, ss:

TAUNTON, *Aug'st* 31, 1868.

Before me, a notary public, within and for the State of Massachusetts, residing in said Taunton, personally appeared William Mason, of said Taunton, the petitioner in a certain petition against the United States, now pending in the United States Court of Claims at Washington, D. C., dated at Taunton, the 1st day of Oct., A. D. 1867, and praying said court to enter judgment in behalf of him, the said Mason, for the sum of *of* five hundred thousand dollars; and the said William Mason, whose name is hereunto subscribed, and who being duly sworn, doth depose and say that no assignment or transfer of the above-named claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true.

W'M MASON.

Subscribed and sworn to this 31st day August, A. D. 1868, before me.
{ SEAL. JAMES P. ELLIS, NOTARY PUBLIC. } JAMES P. ELLIS,
Notary Public.

Filed in the clerk's office Oct. 9, 1868.

8 In the United States Court of Claims. December term, A. D. 1869.

WILLIAM MASON
vs.
THE UNITED STATES. } No. 2947. Filed Dec. 6, 1869.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $500,000, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOM'S H. TALBOT,
Assistant Attorney General.

9 In the Court of Claims.

WILLIAM MASON
vs.
THE UNITED STATES. } 2947.

At a Court of Claims held at the Capitol, in the city of Washington, thirtieth of January, A. D. 1871, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said William Mason take nothing by his suit, and that his petition be dismissed.

By the court.

A true copy of record.

10 In the Court of Claims. Dec. term, 1870.

WILLIAM MASON
vs.
THE UNITED STATES. } No. 2947.

Now comes the plaintiff, and prays an appeal to the Supreme Court of the United States from the judgment of this court.

THOMAS WILSON,
Att'y for Cl'm't.

Filed in the clerk's office March 24, 1871.

Ordered, That the appeal in the case of William Mason vs. The United States be allowed as prayed for.

By the court.

M'CH 28, 1871.

11 United States Court of Claims.

WILLIAM MASON
vs.
THE UNITED STATES. } No. 2947.

This case coming on to be heard on the 14th day of December, 1870, before the Court of Claims, the court upon the proofs and evidence make and determine the following findings of fact and conclusions of law:

I. The defendants, on the 7th January, 1862, through their Chief of Ordnance, General James W. Ripley, and by the express direction of the Secretary of War, made in writing this offer to the claimant to wit:

"I offer you an order for fifty thousand (50,000) muskets, with appendages, of the Springfield pattern, on the following terms and conditions, viz: These arms are to be forwarded, with the regular appendages, and are to be in all respects identical with the standard rifle musket made at the United States armory at Springfield, Massachu-

12 setts, and are to interchange with it and with each other in all their parts. They are to be subject to inspection by United States inspectors, in the same manner that the Springfield arms are inspected, and none are to be received or paid for but such as pass inspection and are approved by the United States inspectors. These fifty thousand

(50,000) arms and appendages are to be delivered at your armory as follows, viz: Not less than (1,000) one thousand in each of the months of July, August, & September, 1862; not less than (2,000) two thousand in each of the months of October and November, 1862; not less than (3,000) three thousand in December, 1862; and not less than (4,000) four thousand per month thereafter, until the entire fifty thousand shall have been delivered; and you are to have the right to deliver more rapidly than according to the number of arms before specified, if you can do so. In the case of any failure to make deliveries to the extent and at the times before specified, you are to forfeit the right to deliver whatever number may be found deficient for the month in which the failure occurs. All the arms and appendages are to be deliv-
13 ered by you; and this order, if transferred to another party, is to be thereby forfeited. Payments are to be made, in such funds as the Treasury Department may provide, for each delivery, on certificates of inspection and receipt by the United States inspectors, at the rate of twenty dollars ($20) for each arm, including appendages. All these arms and appendages are to be packed by you in cases of the regular pattern, with twenty (20) muskets and appendages in each box, for which a fair price, to be determined by the inspector, will be allowed.

"It is further directed by the War Department that double the number of arms and appendages, viz, one hundred thousand, will be received, if manufactured at your establishment, in Taunton, Massachusetts, and delivered within the times before specified for the delivery of the fifty thousand arms and appendages. All the other terms and conditions of this order remaining unchanged for the additional 50,000."

On the 20th January, 1862, the claimant in writing duly accepted the foregoing order, and his acceptance thereof was duly received by the defendants' Chief of Ordnance.

II. The claimant immediately proceeded to make changes of machinery in his machine works, and to do whatever was necessary to insure
14 the full and complete performance of the agreement set forth in the first finding of fact; and the claimant was able and willing to perform according to the terms of his agreement. His expenditures for changing his machine-works into an armory, as required by the agreement, amounted to seventy-five thousand ($75,000) dollars, and the profits which he would have made upon the muskets ordered, if he had been allowed to perform, would have amounted to $5 25 per musket.

III. On the 13th March, 1862, the Secretary of War, by an order of the War Department—

"Ordered, That the honorable Joseph Holt and the honorable Robert Dale Owen be, and they are hereby, appointed a special commission to audit and adjust all contracts, orders, and claims on the War Department in respect to ordnance, arms, and ammunition; their decision to be final and conclusive as respects this Department on all questions touching the validity, execution, and sums due or to become due upon such contracts, and upon all other questions arising between contractors and the Government upon such contracts.

15 "2ond. The said commission will proceed forthwith to investigate all claims and contracts in respect to ordnance, arms, and ammunition in the War Department, or pending settlement and final payment, and adjudicate the same. All persons interested in such contracts may appear in person, but not by attorney, before said commissioners, and be heard respecting their claims, at such time and place as the commissioners shall appoint. The Chief of Ordnance and all other officers in the Department will furnish such books and papers as the commis-

sioners may require. Major Hagner, of the Ordnance Department, is specially assigned to aid and assist the commissioners in their investigations. All claims that they may award in favor of shall be promptly paid. No application will be entertained by the Department respecting any claim or contract which they shall adjudge to be invalid.

"3rd. If, in their investigation, they shall find reason to believe that any agent or employé of the War Department was, directly or indirectly, interested in any contract for ordnance, arms, or ammunition, or received any consideration for its procurement, they shall give notice thereof to the claimant, and proceed to investigate and determine the fact, taking such testimony as they may deem proper; and if the fact of
16 such interest be established, it shall be good cause for adjudging the claim to be fraudulent."

On the 15th May, 1862, the Holt-Owen commission, without the consent and against the remonstrances of the claimant, decided and reported to the Chief of Ordnance:

"That the order to Mr. Mason be confirmed, subject to all its terms, to the extent of thirty thousand muskets, upon condition that he shall, within fifteen days after notice of this decision, execute bond, with good and sufficient sureties, in the form and with the stipulations prescribed by law and the regulations, for the performance of the contract, as thus modified, resulting from said order and acceptance; and, upon his failure or refusal to execute such bond, then the said order shall be declared annulled and of no effect."

On the 30th of May, 1862, the Chief of Ordnance transmitted a copy of the foregoing decision to the claimant, and also the contract and bond contemplated by the commission in its decision, with the request that the claimant would execute and file them within fifteen days after their receipt by him, if he should "accept the order as confirmed by the commission." The claimant thereupon executed such written contract, on the 25th day of June, 1862, whereby he contracted and engaged
17 to furnish to the defendants thirty thousand muskets of the Springfield pattern." This contract was performed by both the parties, and no other muskets were ever furnished by the claimant to the defendants.

And upon the facts aforesaid the Court of Claims, as a conclusion of law, decides:

That the original contract between the parties for the purchase and sale of one hundred thousand Springfield muskets was changed and modified by the voluntary act of the parties in the written contract, 25th June, 1862, and that the petition of the claimant should be dismissed.

By the court.

(Indorsed:) 2947. William Mason vs. The United States.

18 In the Court of Claims.

WILLIAM MASON
vs.
THE UNITED STATES. } No. 2947.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimant, for the allowance of an appeal, as filed in the clerk's office, March 24, 1871, and of the order of

the court of 28th March, 1871, allowing the same; of the finding of facts and the conclusions of law thereon, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this first day of July, A. D. 1871.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 569. William Mason, appellant, vs. The United States. Court of Claims. Filed 5th October, 1871.

Supreme Court of the United States.

DECEMBER TERM, 1872.

No. 115.

WILLIAM MASON, appellant, *vs.* UNITED STATES.

It is stipulated that the finding of fact in this case may be amended as follows: In the second finding on page 6 of the record, after the word, "agreement," and before the word "His," insert "Prior to the receipt of the copy of the decision of the Holt-Owen Commission hereinafter mentioned,"

THOMAS WILSON,
Attorney for Appellant.
C. H. HILL,
Assistant Attorney General for respondent.

Filed January 13, 1873.

Supreme Court of the United States.

DECEMBER TERM, 1872.

WM. MASON, APPELLANT, *vs.* UNITED STATES.

BRIEF OF APPELLANT.

Assignment of Errors.

The Court erred—

1*st.* *In its conclusions of law.*

2*d.* *In dismissing the claimant's petition.*

3*d.* *In not rendering judgment in favor of claimant.*

Statement of the case.

This is an appeal from the judgment of the Court of Claims, dismissing the plaintiff's petition.

The facts are found by the Court of Claims, and set forth in the record on pp. 5, 6, 7.

The case is as follows:

The Chief of Ordnance, under the express direction of the Secretary of War, made a contract and agreement with the plaintiff that he should furnish for the United States 100,000 muskets of the Springfield pattern. The description is as follows:

"These arms are to be furnished with the regular appendages, and are to be, in all respects, identical with the standard rifle-musket made at the United States armory at Springfield, Massachusetts, and are to interchange with it, and with each other in all their parts; they are to be subject to

inspection in the same manner that the Springfield arms are inspected, and none are to be received or paid for but such as pass inspection, and are approved by the United States inspectors."

There being at this time, January, 1862, a great scarcity of arms, and a great necessity for them, and the armories in the United States being unable to supply the demand, the United States was desirous of securing the erection of additional armories; and as a reason for giving a contract to the plaintiff for so great a number of muskets, provided for a change of his machine-shops at Taunton, Massachusetts, into an armory, and the receipt and acceptance by the United States of the 100,000 muskets was made conditional upon their being manufactured by the plaintiff in his yet-to-be constructed armory.

It was upon this condition that his contract was to be for 100,000 muskets. If he failed in this condition and did not convert his machine shop into an armory, and did not manufacture the muskets at his establishment in Taunton, Mass., then the number which the United States agreed to receive was restricted to 50,000.

The objects sought to be secured to the United States by this contract were twofold:

First. The obtaining of the specific number of arms contracted for; but

Secondly. The more important consideration was to secure the construction and erection of a large and extensive armory, under the auspices of the United States, which would be able to supply, for the Government, arms in sufficient quantities for its future possible needs, and enable it thereby to control the market, and make itself independent of foreigners, or of contractors in foreign arms.

The witnesses state these facts so well and so concisely that no language of mine can make them appear so clear to the

court, and therefore I may be excused if I adopt their language.

General Cameron, in showing the searcity of arms, the necessities of the Government, and its determination to encourage and rely upon home manufacturers, says:

"During the period I occupied that office (Secretary of War) there was a public exigency demanding a large supply of arms; there was a war, as the world knows, which began directly after Mr. Lincoln's administration commenced, at which time there were in all the arsenals of the Government, according to the reports brought me, only 300,000 muskets and rifles, and very few swords, and a few cannon. I did not at that time think the war would end until the power of the rebels had been broken by force of our arms, and then believed it would require a larger army than the world had ever seen to save the Union. I knew we had men ready to fill the army, for they were offered by thousands daily, but we had no arms. The rebels when they went out had carried all but 300,000, and many of those left were worthless. I was convinced from deep reflection, that we needed a million muskets, for the million men I was preparing for the field from the outset, and another million to be ready to put into their hands fast as they were lost or destroyed. * * * After much anxiety about guns I determined, on consultation with Mr. Lincoln, to encourage the manufacture in our own country of every class of material needed for the use of our army. We had previously sent agents to Europe to purchase muskets wherever they could be found. One of these agents had contracted for a large number in England of good quality, but the British Government refused to let them come. Next our agents went to France, but were disappointed there as to the number and quality they could obtain. From Belgium we got a large number of muskets for which we paid, I think, eighteen dollars a piece. Failing abroad, I directed the Chief of Ordnance to fix the proper price to be paid for muskets and other arms of the best quality and kind, and then ordered Col. Thomas A. Scott, Assistant Secretary of War, to make contracts with any responsible parties in the United States who were believed to have the proper capital and capacity for the fulfilment of their contracts, for a sufficient number, I think not exceeding two millions including those we had. * * * I believe that these 'gun contracts' were needed to save the Union, and I believed that making allowance for any that might fail they would in due time produce guns enough to supply the army, which at that time was much larger than anybody around me supposed could be needed.

* * * * * * * * * * * *

My reason for making these contracts was, as I have said, that our great trouble was in getting reliable guns for the immediate use of the army. There was a constant appeal every day by the Governors of the different States, as well as by officers in command of the armies, for more arms to supply the troops who were rushing into the service. I thought we should have enough guns from these contracts to save the country, and that the conditions were sufficient to save the Government from a loss. * * This was the only

open market there was; there was no open market, if it is meant by that that any one had good guns ready for delivery. We had sent all over the world to buy them, and there were none in this country because the rebels had carried them all off.

Question. Did you, or not, in the efforts which you have related and the means which you adopted to procure arms, have the approval of the President?

Answer. Always; and more than that, up to the time I left the War Office we never had arms enough, and there was scarcely a day that the President did not send urgent appeals to me for arms. I had directed the collector of customs in New York not to allow any guns brought into the country for sale to be offered to anybody until the War Department had notice of their existence, and had used every means within my control to obtain an immediate supply, before I authorized these contracts to be made.

Also, Colonel Thomas A. Scott, Assistant Secretary of War, describes the circumstances thus:

We were organizing a very large army at that time, and feared that the Government could not furnish equipments nearly as fast as the men were being enlisted and organized; and in order to provide properly for the equipment of large armies that were being demanded, it was deemed wise to secure a large addition of muskets of the Government standard wherever it could be done within limited periods of time; to effect this, the Secretary of War, Hon. Simon Cameron, gave instructions to have contracts made with reliable American manufacturers, if such parties would enter into agreements to manufacture them within certain times, all of which was specified in the several contracts when made by the Ordnance Department. * * * I don't believe advertising for proposals to furnish guns would, at that time, have availed the Government at all, for the reason that this country was destitute of machinery for making guns outside of the works of the General Government, and to accomplish the end it was necessary to secure the services of practical manufacturers, and induce them to engage in the preparations needful to supply the wants of the Government. The plan adopted by the Secretary of War was deemed the only practicable one at the time. This plan was with the approval of President Lincoln. * * * Efforts were made to get arms from the English and French Governments, both of which failed to bring any practical result; a number of orders were given to parties who claimed to have control of arms in Europe, but nearly all of them failed to make deliveries of an arm that was satisfactory to the Ordnance Department; our final and chief reliance to furnish the arms needed, was upon the works of the Government, and the manufacturers of this country.

The contract provided for the first delivery in July next following.

The plaintiff in accordance with the terms and condition of this contract, proceeded to alter and change his machine shops and establishment at Taunton, Massachusetts, into an

armory, and expended in and about alterations and machinery in the same, the sum of $75,000. This was done and was necessary to be done, as was well understood by both parties, in order to enable the plaintiff to comply with the terms of his contract. It entered into and became part of the contract. He also proceeded to purchase stock necessary to manufacture the muskets required of him under his contract. These purchases amounted to over $500,000, and for this amount he had either expended and paid money, or contracted liabilities which he would be compelled to meet. He had thus expended, prior to the month of May, 1862, not less than $575,000 in preparing for his performance of the contract according to its terms and conditions.

At this juncture, and while the plaintiff was engaged in carrying out and performing his part of the contract, and after he had made the expenditure of $575,000 in relation thereto, as above stated, the Holt-Owen Commission as it is called, without his consent, and against his remonstrance, made an order on the 15th of May, 1862, by which they abrogated the said contract and declared it annulled and of no effect. This order was not sent to him until May 30th.

This decision of the commission was held by the War Department to be final and conclusive.

I cannot do better in this connection than use the language of the witnesses in describing the ability of Mr. Mason, and the capacity of his establishment to be converted into an extensive armory, as follows:

Mr. Mason has been engaged in manufacturing cotton machinery and locomotives principally—of cotton machinery since 1842, and of locomotives since 1852. At the breaking out of the war 1861, his works were extensive, having in 1861 and 1862 about five hundred hands; at this date he employs seven hundred hands. His works extended over—in 1862—six or seven acres, and inclosed about thirty buildings; they are more extensive now than at that time; at that time he had invested in his works some four or five hundred thousand dollars. His manufactures amounted in 1860 to $381,000, in 1861 to $400,000, in 1862 to $340,000, in 1863 to $600,000, in 1864 to $740,000. The foregoing does not include the manufacture of guns. In 1862 the works were largely diverted from its usual manufactures towards the manufacture of arms, expected under the contract of January 7, 1862, with the United States Government.

Also, what Mr. Mason did after receiving his contract, and before any notice of its recission by the Holt-Owen Commission, and the amount of money he expended, as follows:

Mr. Mason made no guns under the contract of January 7, 1862, because the contract was rescinded before the time named for the first delivery of guns under that contract.

The contract was rescinded on behalf of the United States by the "Holt-Owen Commission," as it was called; that is, Commission consisting of Joseph Holt and Robert Dale Owen. Mr. Mason received notice of the rescinding of that contract in the early part of June. The letter transmitting such rescinding bears date May 30, 1862, and was from General James W. Ripley, Chief of Ordnance.

Mr. Mason, on receipt of the contract in January, 1862, proceeded at once to manufacture and produce the guns under the contract, in accordance with its terms, devoting to that object his personal efforts, and all the advantages of his extensive works. He took means to manufacture and purchase the necessary tools and machinery, and made contracts for such parts as were needed to complete the muskets called for under the first part of the contract of January 7, 1862; in doing this he made expenditures and incurred liabilities, up to the time of receiving notice that this contract was rescinded to the amount of nearly six hundred thousand dollars. At the time of rescinding the contract he had made and purchased the machinery for the manufacturing barrels, ramrods, stocks, and some of the small parts, and had made alterations and enlargement of his buildings, for the execution of the contract. The machinery he had provided was sufficient to produce two hundred and fifty guns in ten hours of the parts for which it was intended. He employed an average of over one hundred men on the tools and machinery for the manufacture of guns during the time between January and June, 1862.

The value of the machinery made and purchased by Mr. Mason for carrying out this contract, before the rescinding, was $75,250, of which the greater part he made himself.

At the time of rescinding the contract, Mr. Mason was then engaged in preparieg his works for an armory that would be complete in itself, to manufacture every part of the Springfield musket. * *

This contract for the 100,000 guns was tendered to Mr. Mason without his solicitation. Mr. Mason did not consent to, nor accept the decision of the Holt-Owen Commission.

He signed the new contract for thirty thousand guns June 25, 1862, under protest, this being the only way left him to extricate himself from heavy loss, that he must otherwise incur, having already invested about $75,000 in tools and machinery, and about $500,000 in materials to be used in manufacturing the guns under contract of January 7, 1862. He did not accept the contract for 30,000 guns in satisfaction of the contract for 100,000 guns which the Holt-Owen Commission had rescinded.

In the findings of fact—

The Court of Claims has stated Mr. Mason's expenditures, before receiving notice of the recission of his contract, at $75,000.

I have stated it at nearly $600,000.

The discrepancy or difference arises from their omission to make any finding as to his expenditures for stock and materials. That this was an omission is clearly shown by an examination of their opinion delivered in this case, (6 Court Claims Rep., 67,) where the amount is stated to be $575,000. However, the precise amount makes but little difference, for the *principle* involved can be as well decided in the case of the smaller as the larger amount.

This suit is brought to recover damages for the abrogation and annulment of the plaintiff's contract.

The reason given by the Court of Claims for the dismissal of the plaintiff's petition and its rejection of his claim for damages, was as follows: that while this abrogation and annulment was illegal, and left the plaintiff with a good right of action against the United States, yet, because the order of the commission had given to the plaintiff the privilege or choice of accepting or not, a contract for 30,000 muskets, instead of 100,000 muskets before agreed upon, that his acceptance of the new contract was a relinquishment of the old one, and that the relinquishment of the old one was a relinquishment of all his rights under it.

The order of the Commission, made May 15, 1862, is to be found in Rec , p. 7.

It provides, in short, that the plaintiff's contract for 100,000 muskets should be reduced to 30,000, and that, if he refuses to accept this modification, then the order for 100,000 is declared annulled and of no effect.

From the conclusion of law at which the Court of Claims arrived I dissent, and ask this Court to examine and pass upon the same.

Argument.

My propositions of law and fact are as follows :

I. There is no pretence of fraud or misrepresentation on the part of any person either in the making or execution of this contract.

None is charged—none proved—none found.

II. That the prices agreed to be paid are fair and reasonable.

This is shown by the circumstances, the demand, the necessity, the scarcity of arms, the magnitude of the undertaking, the amount of money to be invested, the length of time to be consumed, the risk to be run, &c., coupled with the fact that it was the offer of the United States, and that Mason did not seek it

Read Op., 6 C. C. Cls, p. 66.

The prices agreed to be paid in other cases of like nature, which have been before the courts, were as follows:

Justice, Dec. tr. Sup. Court, 1872,		$20 per musket.
Ramsdell, 2 C. Cls. Rep., p. 517,	518,	$21 do.
Garrison,	do.	508, $27 do.
Stevens,	do.	99, 103, $20 per carbine.
Smith, 5	do.	497, $20 per musket.

III. That the plaintiff was able and willing to perform his portion of the contract.

See finding of fact, Rec. p. 6.

IV. That the arms contracted for were necessary for, and required by, the United States in the emergency caused by the breaking out of the rebellion and the stealing by the rebels of all the arms belonging to the United States.

This is shown by the subsequent history of the war. It was known to every one in the country. General Cameron stated it to Congress and the President. (See his report as Secretary of War, 1861.)

V. That this commission had no authority of law to change or reduce the plaintiff's contract, and

VI. The Secretary of War had no such authority.

United States *vs.* Adams, 7 Wall., 478, 2d paragraph, and 480, 2d paragraph.

United States *vs.* Child, 12 Wall., 242, 3d paragraph.

United States *vs.* Justice, MSS. Op., p. 2.

VII. Any attempt to change or reduce the plaintiff's contract without his consent, either by the Commission or by the Secretary of War, was illegal, and, if consummated, gave to the plaintiff his right of action against the United States for damages resulting therefrom.

VIII. That the action of this commission was without his consent and against his remonstrance.

See finding of fact, Record, p. 7.

IX. That the commission, by its order, declared the plaintiff's original contract "annulled and to be of no effect."

See finding of fact, Record, p. 7.

This order provides, in short, that his contract shall be modified and reduced from 100,000 guns to 30,000, and if he refuses to accept a contract for the lesser number, then his original contract, "shall be declared annulled and of no effect."

X. The Secretary of War declared in advance that the decision and orders of the commission should be final and conclusive, so far as respected that Department, and the award of the commission was ratified and acted upon by the Ordnance Bureau and the War Department. It thus became the act of the United States.

See the order of appointment of commission, par. 1, Record, p. 6.

Also, for ratification, &c., by the Chief of Ordnance, see finding of fact, Record, p. 7.

XI. The 100,000 gun contract was tendered by the United States to the plaintiff; he accepted it; he entered upon its performance; in so doing he expended a large amount of money, nearly $600,000. When the tender of the 30,000 gun contract was made to him by the order of the commission, in lieu of the one for 100,000 guns, accompanied by the threat that if he declined the lesser, the greater was thereby annulled, then his acceptance of the 30,000 gun contract was not free and voluntary.

XII. The only method left the plaintiff to prevent the total abrogation and annulment of his contract and relieve himself from the danger of irretrievable ruin, nigh unto which he had been brought by the action of the United States, was to accept the new contract for 30,000 muskets tendered him by the commission. There was left to him no alternative. It was "Hobson's choice," that or none.

XIII. The order of the commission was compulsory, and the United States having possession of his money to the amount of nearly $600,000, or having induced him to part with the possession of that amount of money in the performance of his contract with the United States, any attempt to enforce this order and compel him to make a new contract, without putting him *in statu quo*, was placing him under duress of money or property, and was illegal; and his acceptance of the new contract, under these circumstances, does not operate as a relinquishment of any of his rights under the old contract.

These propositions will be considered together, and in support of them I will take the following grounds and cite the following authorities:

a. This case is not like those of Adam, (7 Wall., 474,) Child, Pratt and Fox, (12 Id., 242,) or Justice's MSS. of present term.

Those cases proceeded and were decided upon what was substantially the following state of facts:

1. A contract or agreement, either express or implied, between the United States and the plaintiffs, by which he is to perform service and labor or furnish material for which the United States are to pay him.

2. Performance averred by the plaintiff.

3. Presentation of his claim for money in payment thereof.

4. Refusal to pay and dispute of the claim by the United States.

5. Reference of the claim to a commission.

6. Award by the commission in favor of the claimant of a portion only of the amount claimed, and a tender of that portion to him as a compromise and in full satisfaction of his claim.

7. Remonstrance by and protest of the plaintiff.

8. His final receipt and acceptance of the sum awarded to him.

This has been held again and again to be a flat bar to the recovery of the balance which was rejected.

Now look at the difference between those cases and the one at bar.

In those cases the claimants went before the commission averring that they had *performed* their contracts.

When Mason's case was before the commission there could not have been any averment of performance, for the first delivery under his contract was not required until July, 1862.

In those cases the claimants made a *claim* against the United States for money due.

Mason made no *claim* against the United States.

In those cases the United States *disputed* their claims.

In Mason's case there was no claim to dispute.

In those cases after the award was made by the commission of a certain sum found to be due to the claimants, that sum was tendered by the United States to them as in full satisfaction and by way of compromise.

In Mason's case there was no *sum* found to be due, there was no *tender* made to the claimant, there was no *agreement* that he would make an acceptance as in full satisfaction, nor was there any agreement that could make it either in law or fact a compromise.

The entire theory and law of those cases as laid down in opinions of this court proceeds upon the basis of a compromise of a doubtful or disputed claim, by tender by the United States and receipt by the claimant, of a part of the money claimed, with the condition that it should be in full satisfaction of the whole.

In Mason's case there is no such state of facts.

b. But in order to make this compromise valid or binding, the acceptance by the claimants of the sum tendered under it must have been free and voluntary, (see those cases,) and

must not have been obtained by either fraud or oppression, (1 Story's Eq. Juris., sec. 239, 340, 345*a*.)

Nor by extortion. (Id.)

White *vs.* Heylman, 10 Casey, 142.
Wakefield *vs.* Newbon, 6 Q. B., 281.
Cartwright *vs.* Rawley, 2 Esq., 723.

The parties must stand upon equal grounds, and not by the one taking an unfair advantage over the other's necessities.

Wheeler's *vs.* Smith, 9 How., 55.

As to payments made or promises given under an alleged compromise enforced by duress of goods or from the necessities of the party, see the following:

Astley *vs.* Reynolds, 2 Str., 915.
Atlee *vs.* Backhouse, 3 M. & W., 643.
Oates *vs.* Hudson, 5 E., L. & E. Rep., 469.
Chase *vs.* Dwinel, 7 Green., 134.
Shaw *vs.* Wood, 7 Barn. & Cress., 73.
Parker *vs.* G. W. R. R. Co., 7 Mann. & Gr., 253.
Ripley *vs.* Gelston, 9 Johns. Rep., 201.
Clinton *vs.* Strong, 19 Johns. Rep., 370.
Elliott *vs.* Swartwout, 10 Peters, 137.
Ashmole *vs.* Wainwright, 2 Q. B., 837.
Smith *vs.* Bromley, 2 Doug., 695.
Fleetwood *vs.* New York, 2 Sandf., 475.
Harmony *vs.* Bingham, 1 Duer, 210, 228, 229.
s. c. Court of Appeals, 2 Kernan, 109.

c. I have shown that to be binding the acceptance of this compromise must have been free and voluntary; that the claimant must have been free to accept or reject, free to assent or dissent. This freedom of choice must be the same as he exercised when the first offer was made to him, and when he could have rejected the offer or accepted it, as best

pleased him, and no detriment or damage could come to him in either event.

This court has, in the cases cited, laid down the doctrine, in the most emphatic terms, that the United States was to be treated and dealt with in the administration of the law as it pertains to contracts in the same manner as other contractors, private persons, and that if this compromise were offered by one contractor to another, that other was free to accept or reject the proffered compromise, and the pith of the decision is that if he rejected it he was left to his recourse before the courts of the country for the settlement of the dispute and the enforcement of his rights in the same manner as is provided for the settlement of all legal disputation between private persons.

Now, the point I make, and it is one that has not before been decided or passed upon by this court, is that at the time Mason accepted this new contract there was no method or mode provided by which he could enforce his rights. There was no court in the country having any jurisdiction to afford him any relief, or before which he could be heard to ask the enforcement of his rights. The Court of Claims had not then been established, and Mason had not the gift of foreknowledge, and so knew not that it ever would be. The establishment or non-establishment of the Court of Claims rested with and depended upon the United States, and it had failed to make any provision for such a court. So if Mason had the *right* to reject the new contract, and also the *right* to insist upon the obligations of the old, yet there was no place, court, or forum before which he could enforce these *rights*. This court decides the offer and acceptance to be valid and binding as a compromise when made between private persons, because the offeree is free to reject the offer, and that he has his remedy over against the offerer for his alleged breach of contract. But Mason was without remedy in this respect. The defendant had theretofore insisted upon

its sovereign rights and refused to allow Mason or any one else to bring suit against it.

Private persons could then sue each other, but not the United States.

The United States could sue Mason, but Mason could not sue the United States.

This left Mason remediless. He did not stand on equal terms with the United States, nor did the United States stand on equal terms with private persons.

d. The Commission was not authorized by the order of Secretary of War to take any steps in regard to Mason's contract. His order did not authorize them to overhaul and remodel contracts already made and in full force, nor to set aside old contracts and make new ones in their stead. They could not substitute *their discretion* in the making of contracts, for the discretion of those in whom the law had already vested that power.

e. In Mason's case the act complained of, *i. e.*, the abrogation of the old contract without his consent, was unlawful even if done by an officer of the United States, having full authority to make such contracts. The officer might have authority to *make* the original contract, and yet it would be an unlawful act for him, without Mason's consent, to *unmake* it.

But the commission had no lawful power or authority in the premises. It could neither *make* nor *unmake* a contract, nor had it any authority to bind the United States in any way whatever.

See U. S. *vs.* Adams, Child & Co., Justice.

XIV. His acceptance of the new contract not being voluntary, but under duress, does not revoke or discharge the old contract; and it remained in full force and effect, and he is entitled to all his rights of action under it.

XV. His rights under the old contract give to him an action for damages for its abrogation and annulment.

XVI. The rule of damages, where a contract has been unlawfully abrogated or annuled, is the difference between the cost price and the contract price—*i. e.*, the gain or profit which he would have made if allowed to perform his contract.

Phil., Balto. & Wil. R. R. Co. *vs.* Howard, 13 How., 307.
Floyd & Speed *vs.* The United States, 8 Wall., 84.
Clark *vs.* The Mayor, &c., 4 N. Y. Rep., 338.
Masterton *vs.* Brooklyn, 7 Hill, 62.

Conclusion.

In this case there was no *claim*, no *dispute*, no *agreement*. The commission had no jurisdiction over this matter. If it had, it had no lawful authority or right to act. Its act was illegal. There was offered to Mason a new contract, and he accepted it, but this was not a compromise. It was not free or voluntary on his part. It was accompanied by a threat. He had been induced by the defendant to invest and part with the possession of a large amount of money under his agreement with the United States, and the threat was clearly given that if he did not accept the new contract he should be deprived of *all* rights under his original contract. His acceptance was under duress. He was coerced to it; it was the result of oppression, extortion, and taking an unfair advantage of his necessities. He had no choice but acceptance. His refusal would have cost the loss of all the money he had invested. He would have been left without a remedy, and his refusal would have resulted in his bankruptcy and irretrievable ruin.

It is folly, under these circumstances, to say his acceptance of this new contract was either free or voluntary, or that it operated as a compromise, or was a relinquishment of his rights under his original contract.

The above propositions I believe to be true and correct, and logical sequences of one another and of the facts stated. I believe they cover every part of the case, and if so, then I shall expect a reversal of the judgment of the Court of Claims.

THOMAS WILSON,
Attorney for Appellant.

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

WILLIAM MASON, *Appellant*,
vs.
THE UNITED STATES. } No. 115.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

ARGUMENT.

This case would seem to come very clearly within the recent decisions of this court to the effect that where a commission sat to investigate the relations between the Government and any contractor, and their report was acquiesced in and acted upon by both parties, such decision and acquiescence is an answer to any claim against the Government under the original contract.

In the present case the claimants had an agreement with the Government to supply them with certain arms. A commission, consisting of Mr. Holt and Mr. Owen, was subsequently appointed by the Secretary of War "to audit and adjust all contracts, orders, and claims on the War Department in respect to ordnance, arms, and ammunition;" and "to investigate all claims and contracts in respect to ordnance, arms, and ammuni-

tion in the War Department, or pending settlement and final payment, and adjudicate the same."

This commission took into their consideration the contract between the Government and Mason, as well as the contracts of other parties, and their decision thereon and report to the Chief of Ordnance was as follows:

"That the order to Mr. Mason be confirmed, subject to all its terms, to the extent of thirty thousand muskets, upon conditions that he shall, within fifteen days after notice of this decision, execute bond, with good and sufficient sureties, in the form and with the stipulations prescribed by law and the regulations, for the performance of the contract, as thus modified, resulting from said order and acceptance; and upon his failure or refusal to execute such bond, then the said order shall be declared annulled and of no effect."

It is immaterial that previous to this order Mason protested against the interference of the commission in his contract; for, be that as it may, it is found, as a fact, by the Court of Claims that this report was transmitted by the Chief of Ordnance to the claimant, and also the contract and bond contemplated by the commission in its decision, with the request that the claimant would execute and file them within fifteen days after their receipt by him, if he should "accept the order as confirmed by the commission." The claimant thereupon executed such written contract on the 25th of June, 1862, whereby he contracted and engaged to furnish to the defendants thirty thousand muskets of the Springfield pattern. This contract was performed by both parties, and no other muskets were ever furnished by the claimant to the defendants.

Upon these facts, the Court of Claims find as a conclusion of law:

"That the original contract between the parties for the purchase and sale of one hundred thousand Springfield muskets was changed and modified by the voluntary act of the parties in the written contract, 25th June, 1862, and that the petition of the claimant should be dismissed."

The case clearly comes within the recent decisions in United States *vs.* Adams; United States *vs.* Child; and United States *vs.* Justice.

G. H. WILLIAMS,
Attorney General.
C. H. HILL,
Assistant Attorney General.

Supreme Court of the United States.

DECEMBER TERM, 1872.

No. 115.

WILLIAM MASON, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

GEO. G. WRIGHT,
Of Counsel for Appellant.

Judd & Detweiler, Printers.

Supreme Court of the United States.

DECEMBER TERM, 1872.

No. 115.

WILLIAM MASON, APPELLANT,

vs.

THE UNITED STATES.

The undersigned appears as counsel in the above-entitled cause, and asks the Court to grant a re-hearing. I have read carefully the record, the evidence upon which it is based, and the opinion delivered by this Court.

No exception is taken to the propositions of law as laid down in the opinion, in respect of voluntary compromise or of duress. It is in the application of these principles to the case at bar, that we think the erroneous decision has been made, and which we hope to have corrected.

I.

The Court says "that the claimant voluntarily accepted the modification of the contract, as suggested by the commissioners, and that he executed the new contract in its place, which he must have understood was intended to define the obligations of both parties."

This, we think, is an error of fact, as can be shown. The claimant did not voluntarily accept the modification of the contract, as suggested by the Commission.

He protested against its action. He remonstrated and never gave his consent that the new contract should stand in place of the old. There is no evidence of any agreement made between the parties that the one should stand in the stead of the other—that the old contract should be done away, and that the new should stand in its place. There is no evidence either direct or by implication that Mason ever made any such agreement.

No compromise was ever made between the parties. In order to establish a compromise there must first be an agreement to compromise. This agreement must be established by evidence, and this evidence is entirely wanting in this case. Agreement requires consent, and no one can pretend that the making of a later contract necessarily implies consent or agreement to the abrogation of a former.

In order to establish a compromise in this case, the court must first make a new agreement for the parties—one which they never made for themselves, and which Mason vowed and protested he would not make, and which he never would agree to.

The word *compromise* is defined to be—

"An amicable agreement between parties in controversy to settle their difficulties by mutual concessions."

In order to effect a compromise, four things are necessary :

1st. Parties in controversy.

2d. Mutual concessions.

3d. Amicable agreement.

4th. Settlement of their differences.

That which took place between the commission and Mr. Mason lacks each one of the above requirements necessary to make a compromise, except the first. They were parties in controversy, but there were no mutual concessions, no amicable agreements, no settlement of differences.

There is no fact found by the Court of Claims which will warrant the conclusion by this court of the existence of these three missing requisites necessary to a compromise.

If the court makes a compromise between the parties, it must first make for them an agreement they never made for themselves.

These statements are borne out by the record. The contract was made with Mason to furnish 100,000 muskets; it stood in full force until the commission attempted to abrogate it. The court says that if the claimant accepted this order of the commission his acceptance did away with the original contract, and that the new one became substituted for it.

But, we ask, what would have been the *status* of the original contract if he, the claimant, had *rejected* the offer of the commission instead of accepting it? Would it have remained in full force? Did the order made by the commission permit it to stand? A critical examination of the order will show that so far as the commission could, though confessedly without any lawful authority, it had by that order stricken down, set aside, and abrogated the original contract, and neither acceptance or rejection by the claimant of the offer made to him by the commission could revive or bring it to life.

The order is as follows:

"It is therefore decided that the order to Mr. Mason be confirmed, subject to all its terms, to the extent of 30,000 muskets, upon condition that he shall, within fifteen days after notice of this decision, execute bonds, with good and sufficient sureties, in the form and with the stipulations prescribed by law and the regulations, for the performance of the contract, as thus modified, resulting from said order and acceptance; and upon his failure or refusal to execute such bond, then the said order shall be declared annulled and of no effect."

Let us analyze this:

"It is decided that the order to Mr. Mason [what order? The order for 100,000 muskets—the original contract] be confirmed, subject to all its terms, [to what extent? the whole 100,000? No, but] *to the extent of* 30,000 *muskets*

[only. What became of the contract for the remaining 70,000 muskets? No mention is made of them and no opportunity given to Mason to accept or reject anything in respect of them,] upon condition that he shall * * * execute bonds * * * for the performance of the contract *as thus modified* * * * and upon his failure or refusal * * * [what penalty is provided] then the said order [what order? the order for 30,000 muskets] shall be declared annulled and of no effect."

It might seem at a casual glance that the words "said order shall be declared annulled and of no effect," referred to the order for 100,000 muskets, but a careful reading of it will show that these words are used by the Commission in regard solely to their own order for 30,000.

The meaning of the decision of the commission is, that Mason could accept the order for 30,000 muskets or he could reject it. If he accepted it he had 30,000 muskets to manufacture. If he rejected it he had none. This was the alternative presented to him; this his only opportunity for choice. He had no choice between 100,000 and 30,000; but it was between 30,000 and none. The original contract for 100,000 muskets was abrogated and set aside by the commission, so far as they could do it. It was "modified" to one for 30,000 and then presented to Mason, and he was requested to choose, not between the original contract and the offered modification; not between 100,000 and 30,000, but between the modified contract and none—between 30,000 muskets and nothing.

The court has treated this subject as though he had the opportunity to choose between his original contract and something offered in its place or stead; that he accepted this offer, and that the thing accepted stood in the place of his original contract. But this is a mistake. The offer made by the commission does not include his original 100,000 gun contract, and no choice was given to him in which it formed one of the alternatives. As I have already said, the commission had abrogated it, so far as they could. The theory that the United States proposed to annul the old contract if

the claimant refused to accept the modification is, we think, not warranted. The proposal was not to annul the old contract upon the contingency of the claimant's refusing to accept the modification. The attempt to annul the old contract took place when the order of modification was made, and the proposal made, was that if the claimant refused to accept the modification, then *it, too*, should be annulled.

The error, we think, arises from a misapprehension of the meaning of the last line of the order of the commission.

At the trial of this case in the Court of Claims the United States did not claim that this action of the commission and the acceptance by Mr. Mason amounted to a compromise.

In the report of this case, 6 Court of Claims Rep., p. 64, the defendant says:

"On the 15th day of May, 1862, the said commission reported upon the case of the claimant, and made the following decision: [here follows the order.] This decision having been communicated to the claimant, he, by letter addressed to the commissioners dated May 28th, 1862, made objection to it, and asked a revision of the award, stating that he was willing to have his order reduced to 75,000 muskets.

"This was considered by the commissioners, and on the 10th of June, 1862, they 'decided that the number of arms assigned to Mr. Mason is as large as the commission think it proper at this time to assign to one contractor at the price of $20.'"

The acceptance of the new contract was not made by Mason until June 25th. (Record, p. 7.)

The period of time between May 15th and June 25th was consumed by Mason in making protests and remonstrances against the action of the commission.

In speaking of the letter of the claimant accepting the new contract and returning it and the required bonds to the chief of ordnance, the Court of Claims says: "This letter was not written, and the contract and bonds which it inclosed

were not executed until *after much remonstrance and many appeals* to the justice of the Government. * * (6 C. Cls., p. 67.)

And in the finding of facts the Court of Claims certifies that the commission made their order "without the consent and against the remonstrance of the claimant."

This Court says "he must have known that the chief of ordnance supposed when he, the claimant, returned the written contract duly executed that the whole matter in difference was adjusted *to the satisfaction* of all concerned."

We respectfully submit that, in view of all the above-mentioned protests and remonstrances made by Mr. Mason at the time, the chief of ordnance knew that the matter in difference was *not* adjusted to the satisfaction *of the claimant,* however it might be to the rest of those concerned.

If Mr. Mason accepted the offer of the commission it was because he was compelled to do so; because there was no law under which he could obtain redress; because while acceptance might be partial ruin, rejection was total ruin; and because "after much remonstrance and many appeals to the justice of the Government" he found it determined to violate its contracts, and that he had nothing further to hope for. The reason given by the commission for their action is proof of their determination to violate this contract. Then, having invested or expended a fortune in his preparation for the execution of this contract, [for which expenditure the United States made no proposition of re-imbursement,] he saw no extrication from the abyss of ruin which the loss of over half a million dollars would inevitably bring to any man, but to accept the half loaf [it was $\frac{30}{100}$] offered him by the United States, or get no bread.

Can this be called voluntary? What is the definition of the word? "Free; without compulsion; unconstrained by the interference or influence of another; of ones own accord; of ones self."

When we consider the character of the services required of Mason under his contract; that he had to relinquish a lucrative and established business; that he was to tear down his extensive works and out of them to build an armory; the magnitude of the undertaking; his ability to perform it successfully; the amount of money invested, machinery constructed, and materials purchased under his contract, then to see that contract stricken down as unexpectedly as would be a clap of thunder in a clear sky, and with his protests and remonstrances from May 15 to June 25, how it can be said that he consented to it and that his consent was free and voluntary, passes my comprehension; and when he accepts the new contract as the alternative between partial and total ruin—when he accepts it as the wounded soldier accepts life after both his legs and arms have been cut off—then to call this a compromise freely and voluntarily made, and say that as such it extinguishes the right he before had, is, in my opinion, a corruption of words.

II.

The court says that parties are bound to good faith in their dealings with the Government, and intimate that the claimant has been guilty of bad faith in the commencement of this suit.

Mr. Mason feels this imputation upon his honor more keenly and with more regret than the loss of his money. He has always known that his conduct in this matter was in accordance with the strictest integrity. He has always believed that the United States was the party guilty of bad faith. He knew the United States had violated and set aside its contract "without his consent and against his remonstrance," with no other excuse or pretence than "that the number of arms assigned to Mr. Mason was as large as they thought proper at that time to assign to one contractor at the price of $20." Mr. Mason did not seek this contract.

The needs of the Government were such that they besought him to take it. His patriotism was excited, and he yielded to the appeals of his Government, so far as to change, to his own detriment, his extensive and lucrative business for one new and untried.

In this whole matter Mr. Mason thought he deserved credit rather than condemnation, and hears, with surprise and grief, the imputation of bad faith made against him by this court.

This imputation of bad faith, however, is made upon the supposition that Mason's acceptance of the new contract was not under protest.

I think we have already shown this supposition to be erroneous. There was no lack of protests or remonstrances on the part of Mason. The order of May 15th was communicated to him ; on May 28th he made objection to it, and then made *his* offer of compromise wherein he said he was willing to have his contract reduced to 75,000 muskets. From that time until June 25th Mason did nothing but protest and remonstrate, and, as the court says, he did not accept until "after much remonstrance and many appeals to the justice of the Government." I am sure the Court of Claims, when it returned, in its finding of facts, that these things were done by the commission "without his consent, and against his remonstrance," supposed that this was all that was needed to be said on that point, and that whatever might be the grounds of affirmance by this court, that a failure on the part of Mason to protest and remonstrate would not be found among them.

III.

The court seem to have proceeded upon the theory that Mason made a claim against the United States for labor or service performed, or material furnished, which claim was disputed by the officers authorized to adjust the same, and a compromise proposed by the offer of a smaller sum than the contract price for the service performed or material furnished.

In Mason's case there was no such state of facts. The United States had received nothing, and did not propose to pay Mason anything. Although he had invested a large amount of money in a contract regularly and lawfully made, yet, in the dispute which arose, and the compromise which was proffered, there was no proposition made by the United States looking towards compensation to Mr. Mason for any of the money which he had expended, the labor he had performed, or the damage he had sustained. So we say that the law as laid down governing compromises of doubtful or disputed claims, has no application to Mason's case, and is not in any way to control or govern it.

IV.

The propositions of law laid down by the court as to duress, are not disputed. But they are not applicable to this case.

The court fails to notice the facts, that here was a contract lawfully made; that in its performance the contractor was required to, and did, expend a large sum of money; that in the dispute which arose, and the compromise which is alleged to have been offered no proposition was made for any compensation in this respect. With this money expended and invested in the enterprise, can it be said that when the choice is presented to Mason, between 30,000 muskets and none, that he is not under the influence of this expenditure, and so far as that amount can influence him, his acceptance of the proffered compromise must be compulsory and under duress. This fact in the case seems to have been entirely ignored by the court in its opinion upon this question.

V.

I respectfully present to the court what I believe to be the true and correct interpretation to be given of this case: That the United States proposed to Mason to make with him a contract; that after propositions and discussions their minds

met and they agreed upon the terms, and consented thereto; there was an agreement between them; that this agreement was reduced to writing, and thus became a legal and valid contract, and its obligations were solemn and binding upon both parties.

It having required the agreement and consent of *both* parties to *make* the contract, it required no less to *unmake* it. After the contract has been made, no dissatisfaction, dissent, or disapproval of one party only, however expressed, will release that party from his obligations under that contract. He can only be released in the same way he became bound; that is, by the consent or with the agreement of his antagonist.

No action by the United States alone, either through this commission, the Secretary of War, or Chief of Ordnance could release it from its obligations under this contract when once made and completed. All such action was unilateral and without any legal effect, as releasing it from its contract. This could only be effected with the consent of Mason.

This consent required to annul or set aside a contract must either be in terms or by such conduct as implies that the consent to annul is given, and the claim for damages is released.

The offer by the dissatisfied party, to make another contract, and an acceptance thereof by the opposite party, especially when accompanied with his dissent and by his remonstrance, can never be held, by any fair implication, to include a release from the original contract or his consent to its annulment.

If we enter the field of presumption, we can presume no more than that Mason knew his legal rights and the legal effect of the new contract. In the absence of stipulation, it would be most unjust, in view of his protests and large expenditures therein made, to presume that he surrendered all benefits or rights under his indisputably valid contract, and which it would be most violent to presume he would surren-

der for nothing. There was no obligation nor was there any power to compel him to do so, and why presume he acted against his interest and in the face of his legal rights?

I think the court is in error in placing the *onus* upon the claimant to show he did *not* consent to the setting aside of his contract. The *onus* must be upon he who has the affirmative—who makes the assertion. The original contract being presented and proved by the claimant, the burden of proof is then shifted, and the *onus* is upon the United States to show that he consented to its annulment, and that he agreed to a release from damages, and this consent and agreement must be as definitely made and as clearly proved by the United States to release it from the contract, and was before necessary for the claimant to make his proof of the contract in order to bind it.

The United States might refuse to accept the muskets, and might notify Mason of its intention to do so, and thus prevent the additional damages arising from their manufacture. But this was all it could do without Mason's consent, and this amounts only to a breach of the contract. For this the party in default is always held liable in damages.

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